

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
— Competitive Bidding for)
Commercial Broadcast and)
Instructional Television Fixed)
Service Licenses)
)
Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)
)
Proposals to Reform the)
Commission's Comparative)
Hearing Process to Expedite)
the Resolution of Cases)

MM Docket No. 97-234 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

GC Docket No. 92-52

GEN Docket No. 90-264

To: The Commission

JOINT COMMENTS

**SCHWARTZ, WOODS & MILLER
On Behalf Of**

Board of Education of the City of Atlanta
Board of Trustees of the University of
North Carolina
Bux-Mont Educational Radio
Association
Educational Television Association of
Metropolitan Cleveland
Fairleigh Dickinson University
Four Rivers Community Broadcasting
Corporation
Lehigh Valley Public
Telecommunications Corp.
Maryland Public Television
Metropolitan Board of Public Education
Mississippi Authority for Educational
Television
New Jersey Public Broadcasting
Authority

Northern California Educational
Television Association
Oregon Public Broadcasting
Penn-Jersey Educational Radio
Corporation
Rhode Island Public
Telecommunications Authority
St. Lawrence Valley Educational
Television Council
Silakkuagvik Communications, Inc.
South Texas Public Broadcasting, Inc.
University of North Carolina Center
for Public Television
University of Southern Colorado
Virgin Islands Public Television System
Wichita State University
WXXI Public Broadcasting Council

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To: The Commission

JOINT COMMENTS

Schwartz, Woods and Miller, on behalf of the public broadcast licensees and Instructional Television Fixed Service (ITFS) licensees listed on Attachment A, files these Joint Comments in the above-referenced Notice of Proposed Rule Making (Notice) concerning broadcast auctions. In support thereof, the following is shown:

A. Background

1. The parties to these Joint Comments (Commenters) include a broad range of public FM and public TV station licensees, low power television (LPTV), TV translator and FM translator facilities associated with such stations, and ITFS stations serving markets throughout the United States. Over the years, these public broadcast stations, secondary service stations and ITFS stations have provided extensive noncommercial educational

programming, including childrens' and instructional programming, news and public affairs programming, and a wide variety of informative, cultural and community programming. The Commenters are vitally concerned that the Commission's proposals in this proceeding, which are aimed at auction processes for commercial radio and television broadcast licensees, should not have adverse consequences, either intended or unintended, for public broadcasters, for secondary services associated with these broadcasters and for ITFS stations.

2. The Commission's Notice, which seeks to implement provisions of the Balanced Budget Act of 1997, proposes to award most initial commercial radio and television broadcast licenses through auctions. The Commission proposes to exclude digital television and noncommercial educational applications proposing operation on reserved channels, but it may include modification applications, noncommercial operations proposed on unreserved channels, secondary service applications (LPTV and FM and TV translator stations) and ITFS stations.

3. This proceeding is of enormous importance to public broadcasters and ITFS licensees. In the Commenters' view, the Commission's proposals would incorrectly link public broadcast primary and secondary services within its auction proposals and would improperly impose auction procedures upon ITFS licensees and applicants. The Commenters urge the Commission not to adopt these proposals, which would have a devastating impact upon public broadcast and ITFS licensees, which regularly confront financial difficulties due to their noncommercial educational nature. These difficulties would almost certainly preclude them from being able to participate equally in the competitive bidding process.

B. The Proposed Auction Procedures Should Not Apply to Noncommercial Educational Stations on Unreserved as well as Reserved Channels

4. Section 309(j)(2) of the Act, as expanded by the Balanced Budget Act of 1997, explicitly states that auction procedures shall not apply to licenses or construction permits "for stations described in Section 397(6) of the Act." In turn, Section 397(6) specifies that

The terms 'noncommercial educational broadcast station' and 'public broadcast station' mean a television or radio broadcast station which --

(A) under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes

The Commission must be guided by this legislative exemption in its deliberations in this proceeding. Indeed, the Commission acknowledges in its Notice, footnote 1, that

the Commission may not use auctions for noncommercial educational broadcast stations. . . Therefore we will not consider the question of full service noncommercial stations further in this proceeding

See also, Notice, footnote 6.

5. Nonetheless, the Commission's proposals do encompass certain full service noncommercial educational stations, contrary to the exemption outlined in Section 309(j)(2). The Commission's exemption is limited to public broadcast stations licensed on reserved channels. No such limitation is set forth either in Section 309(j)(2) or Section 397(6). Nor has the Commission traditionally made any such distinction which would delimit noncommercial educational or public stations to those on reserved channels. Rather, wholly apart from the particular frequency sought by an applicant, the Commission has regularly made determinations regarding the noncommercial educational nature of any proposal upon a review of the nature of the noncommercial educational applicant and the

nature of the noncommercial educational service provided. The same approach, by which form follows function, should be applied to determine the entities properly exempt from the Commission's proposed auction procedures. Accordingly, the Commenters submit that the Commission should exempt all noncommercial educational or public broadcast stations from these auction procedures. In this connection, the Commission should not adopt its proposal, set forth in paragraph 50 of the Notice,

to treat non-profit applicants for commercial frequencies, including those who could qualify under 47 C.F.R. Sec. 73.503 as a nonprofit educational organization, no differently under the proposed filing and competitive bidding procedures than any other mutually exclusive applicant for commercial frequencies.

C. The Proposed Auction Procedures Should Not Apply to Secondary Broadcast Services of Public Broadcasters.

6. In its Notice, paragraph 10, the Commission proposes that the auction rules would apply to mutually exclusive applications "to provide a variety of Part 74 secondary commercial broadcast services. . . , including low power television service and FM and television translators." And footnote 7 underscores that "Only commercial stations in these services will be covered. The Commenters submit that auctions of any secondary services and of public broadcast secondary services in particular are unwise and should be rejected.

7. The Commission does not appear to have taken into account that it has historically not divided LPTV/translator stations into commercial and noncommercial educational categories. Many of the Commenters have authorized TV translator stations, sometimes numbering more than a dozen facilities, in order to assure noncommercial educational services in remote or mountainous regions or other areas of inadequate signal penetration. Others rely upon LPTV service both to overcome such problems and to

provide a vehicle for local noncommercial educational service. With respect to FM translators, the presence of Channel 6 often precludes FM translator service on reserved FM channels. In such instances, as the Commission has readily acknowledged, the availability of non-reserved channels is the only practicable recourse. See Amendment of Part 74 of the Commission's Rules Concerning Translator Stations, MM Docket No. 88-140, released December 1, 1990, pars. 94, 90, 132, 137. As stated by the Commission in para. 94 of its decision, it expects its revised FM translator procedures

to reduce the number of actual interference problems we face, including interference to TV stations operating on Channel 6, since the wider range of channels from which to choose often will allow applicants to choose channels on which the margin of predicted interference protection is greater.

The availability of non-reserved FM channels is also essential where area reserved FM channels are fully in use.

8. In its Notice, par 40, the Commission reaches the "tentative conclusion" that its auction authority under Section 309(j)(1) of the Act, encompasses applications for secondary broadcast service. Its discussion is couched in terms of commercial service, which is consonant with the statutory exemption for public broadcast stations set forth in Section 309(j)(2) of the Act. However, since noncommercial educational applicants as well as commercial applicants may file for available LPTV or translator spectrum, the Commission's proposal to apply auction procedures to LPTV, TV translator and FM translator applications is unworkable and should be rejected. The failure to give consideration to filings by noncommercial educational applicants for these secondary broadcast services ignores the realities of the Commission's translator processing procedures. Any inclusion of noncommercial educational TV translator applications within

the auction proposal would violate the letter and spirit of Section 309(j)(2) of the Act. In this connection, the Commission has properly concluded, in the context of exemptions from Commission filing fees, that public broadcast applicants are exempt with respect to applications in other services "if the radio service is used in conjunction with the noncommercial educational broadcast station on a noncommercial educational basis." See Section 1.1114 (d) of the rules; see also Sections 1.1114(e)(2) and (3).

9. Further, the very secondary nature of LPTV and translator services compels the conclusion that auctions are an unsound approach to the award of authorization for such facilities. As secondary services, they are continually subject to preemption by primary services. Translator licensees would always be vulnerable to the loss of spectrum which they bought in an auction. Absent a provision for a refund of its auction payment, a preempted translator licensee would face a serious financial loss. This result is fundamentally unfair.

10. Alternatively, the Commenters believe that the Commission should carefully restrict any processing procedures and auction proposals in this proceeding solely to the secondary broadcast services of commercial broadcast entities. Wherever any processing procedure would result in the linkage of commercial and noncommercial educational applicants, the resulting mutually exclusive package should be handled separately, under the existing rules applicable to the selection of applicants from among mutually exclusive proposals.¹

¹While opposed to auctions of secondary facilities, the Commenters do support a more uniform filing system for such services. In particular, the Commenters believe that a window system like that used for LPTV and television translator applications would be appropriate for FM translator applications, provided that window notices were released

D. The Proposed Auction Procedures Should Not Include ITFS

11. In its Notice, pars. 98-100, the Commission invites comments on "whether we must, and if not, whether we should, apply competitive bidding to mutually exclusive ITFS applications." The Commenters, which include numerous ITFS licensees, permittees and applicants, strongly believe that the Commission should not impose its proposed auction procedures upon ITFS entities.

12. As the Commission acknowledges, ITFS systems are akin to noncommercial educational broadcast stations, which are themselves exempt from auction procedures. In fact, many ITFS systems are licensed to noncommercial educational broadcast stations. These ITFS stations perform valuable services in the provision of instructional, educational and informative programming to area schools, colleges, universities, institutions and individuals. Like noncommercial educational stations, ITFS stations are exempt from filing fees. See Section 1.1114(e)(4). See also Establishment of a Fee Program, 65 RR 2d 513, 518 (1988). Moreover, the Commission has adopted a comparative point selection procedure for mutually exclusive applications, which has furthered the sound objective of a locally-based instructional service by qualified applicants and has proven to be relatively efficient and expeditious as well. See Section 74.913 of the Commission's rules. Similarly, the Commission's current policies regarding the settlements of ITFS applications have resulted in the timely resolution of a significant number of application conflicts resulting in expedited release of channels for service.

at regular intervals. This process provides applicants with a certainty of the grantability of their proposals which they do not currently enjoy under the existing cutoff system.

13. The imposition of auction procedures upon ITFS applicants is nowhere specifically mandated by the Balanced Budget Act of 1997 and is entirely inappropriate for this educational service. Any such imposition by exercise of the Commission's discretion would have devastating consequences upon ITFS applicants, many of whom have insufficient funds to participate in the auction process. In addition, adoption of any auction process for ITFS stations would likely dilute both the quantity and the quality of noncommercial instructional and educational programming available to the stations.

E. Conclusion

14. The Commenters urge the Commission to restrict this proceeding solely to commercial broadcast proposals. That was the Commission's stated intent, and it also specifically noted that it would not, pursuant to Section 309(j)(2) of the Act, consider noncommercial educational and public broadcast stations. Consonant with these determinations, the Commission should not apply its proposed auction procedures to (a) public broadcast stations on unreserved as well as reserved channels, (b) secondary broadcast services by public broadcast stations, and (c) ITFS.

Respectfully submitted,

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Its Attorneys

January 26, 1998

ATTACHMENT A

Board of Education of the City of Atlanta

WPBA-TV/WABE-FM, Atlanta, GA

Board of Trustees of the University of North Carolina

WUNC-FM, Chapel Hill, NC

Bux-Mont Educational Radio Association

WLBS(FM), Bristol, PA

WRDV(FM), Warminster, PA

Educational Television Association of Metropolitan Cleveland

WVIZ-TV, Cleveland, OH

Fairleigh Dickinson University

WFDU-FM, Teaneck, NJ

Four Rivers Community Broadcasting Corporation

WBYO(FM), Sellersville, PA

Applicant for new public radio station at Stroudsburg, PA

File No. BPED-950417MM

Lehigh Valley Public Telecommunications Corp.

WLVT-TV, Allentown, PA

Maryland Public Broadcasting Commission

WMPB(TV), Baltimore, MD

WMPT(TV), Annapolis, MD

WWPB(TV), Hagerstown, MD

WCPB(TV), Salisbury, MD

WFPT(TV), Frederick, MD

WGPT(TV), Oakland, MD

Metropolitan Board of Public Education

WDCN-TV, Nashville, TN

Mississippi Authority for Educational Television

WMPN-TV/FM, Jackson, MS

WMAB-TV/FM, Mississippi State, MS

WMAE-TV/FM, Booneville, MS

WMAH-TV/FM, Biloxi, MS

WMAO-TV/FM, Greenwood, MS

WMAU-TV/FM, Bude, MS

WMAV-TV/FM, Oxford, MS

WMAW-TV/FM, Meridian, MS

New Jersey Public Broadcasting Authority

WNJT(TV)/FM, Trenton, NJ
WNJN(TV), Montclair, NJ
WNJB(TV), New Brunswick, NJ
WNJS(TV), Camden, NJ
WNJB-FM, Bridgeton, NJ
WNJM-FM, Manahawkin, NJ
WNJN-FM, Atlantic City, NJ
WNJP(FM), Sussex, NJ
WNJS-FM, Berlin, NJ
WNJZ(FM), Cape May Courthouse, NJ

Northern California Educational Television Association

KIXE-TV, Redding, CA

Oregon Public Broadcasting

KOAC-AM/TV, Corvallis, OR
KTVR-TV, LaGrande, OR
KOAB-TV/FM, Bend, OR
KOPB-TV/FM, Portland, OR
KEPB-TV, Eugene, OR
KRBM(FM), Pendleton, OR

Penn-Jersey Educational Radio Corporation

WDVR(FM), Delaware Township, NJ
WYRS(FM), Manahawkin, NJ

Rhode Island Public Telecommunications Authority

WSBE-TV, Providence, RI

St. Lawrence Valley Educational Television Council

WNPE-TV, Watertown, NY
WNPI-TV, Norwood, NY

Silakkuagvik Communications, Inc.

KBRW-AM/FM, Barrow, AK

South Texas Public Broadcasting System

KEDT-TV, Corpus Christi, TX

University of North Carolina Center for Public Television

WUNC-TV, Chapel Hill, NC
WUND-TV, Columbia, NC
WUNE-TV, Linville, NC
WUNF-TV, Asheville, NC
WUNG-TV, Concord, NC
WUNJ-TV, Wilmington, NC
WUNK-TV, Greenville, NC
WUNL-TV, Winston-Salem, NC
WUNM-TV, Jacksonville, NC
WUNP-TV, Roanoke Rapids, NC
WUNU(TV), Lumberton, NC

University of Southern Colorado

KTSC(TV), Pueblo, CO

Virgin Islands Public Television System

WTJX-TV, Charlotte Amalie, USVI

Wichita State University

KMUW-FM, Wichita, KS

WXXI Public Broadcasting Council

WXXI-AM/FM/TV, Rochester, NY